

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 6, 2002

IN RE:

COMPLAINT OF US LEC OF TENNESSEE,
INC. AGAINST ELECTRIC POWER BOARD
OF CHATTANOOGA

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DOCKET NO.
02-00562

ORDER GRANTING IN PART AND DENYING IN PART
US LEC'S MOTION TO COMPEL

This matter came before the Hearing Officer upon the *Motion to Compel of US LEC of Tennessee, Inc.* (the "*Motion*"), in which US LEC of Tennessee, Inc. ("US LEC") requests that the Hearing Officer order the Electric Power Board of Chattanooga ("EPB") to respond to certain discovery requests. For the reasons set forth below, the Hearing Officer grants in part and denies in part US LEC's *Motion*.

US LEC filed the *Discovery Request of US LEC of Tennessee, Inc. to Electric Power Board of Chattanooga* on August 29, 2002. EPB filed the *Electric Power Board of Chattanooga's Response to Discovery Request of US LEC of Tennessee, Inc.* on September 20, 2002 (the "*Response*"). US LEC filed its *Motion* on September 27, 2002, and on October 8, 2002, EPB filed the *Response of EPBC to US LEC's Motion to Compel* (the "*Reponse to Motion*").

In its *Motion*, US LEC requests that the Hearing Officer order EPB to respond or respond more completely to Request Nos. 1, 3, 17, 19, and 21.

Request No. 1

US LEC requests “copies of all documents, (specifically including but not limited to any business plans, cost analysis, and/or market analysis) concerning EPB’s decision to enter the telecommunications business, and to form EPB Telecommunications.”¹ In its *Response*, EPB objected to this request on the grounds that it is overly broad and unduly burdensome and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In its *Motion*, US LEC states that this request is intended to determine whether EPB anticipated that it could “cross-market” EPB and EPB Telecommunications and could benefit from the association of these two companies. In its *Response to Motion*, EPB restates its objection but also states: “Subject to and without waiver of EPB’s objection, EPB will make available for inspection and copying such business plans and marketing plans as EPB can locate that are responsive to this Request.”²

EPB having stated that it will make additional documents available in response to Request No. 1, the Hearing Officer deems it unnecessary to rule on this request.

Request No. 3

This request states:

Please describe EPB Telecommunications relationship to the other divisions of EPB, including, but not limited to, allocation of company expenses, use of facilities, use of personnel division of overhead and use of company owned property (such as vehicles, maintenance equipment, etc.)³

In its *Response*, EPB stated that “[t]he Second Revised Proposed Conditions filed in

¹ *Discovery Request of US LEC of Tennessee, Inc. to Electric Power Board of Chattanooga*, August 29, 2002, p. 3.

² *Response of Electric Power Board of Chattanooga to Motion to Compel of US LEC of Tennessee, Inc.*, October 8, 2002, p. 1.

³ *Discovery Request of US LEC of Tennessee, Inc. to Electric Power Board of Chattanooga*, August 29, 2002, p. 4. US LEC probably intended to insert a comma between “personnel” and “division.”

Docket No. 97-07488 describes and defines the relationship between EPB Telecommunications and EPB.”⁴ In its *Motion*, US LEC states that this response is incomplete. US LEC states that while the Proposed Conditions “describe, in part, how the relationship between EPB and EPB Telecommunications is supposed to work in theory,” the Proposed Conditions do not “describe how this relationship actually works in practice.”⁵ US LEC further states that the Proposed Conditions do not address all of the sub-parts of the request and do not “address what policies EPB has adopted concerning the allocation of expenses, facilities, and personnel.”⁶ In its *Response to Motion*, EPB states that its response to this request was not incomplete. Further, EPB “asserts that the very purpose of the Second Revised Proposed Conditions was to define the relationship between EPB Telecommunications and EPB.”⁷ EPB “submits that by its response to US LEC’s Request No. 3, together with the EPB Internal Audits, US LEC has received the requested information.”⁸

The Hearing Officer finds that EPB has not responded fully to this request. The request is sufficiently clear, and the position stated in US LEC’s *Motion* is reasonable. It is reasonable to conclude that US LEC was requesting factual information as to the actual relationship between EPB and EPB Telecommunications and not simply the proposed relationship as approved by the Authority. US LEC is entitled to know whether there is any discrepancy between the relationship that the Authority approved and the relationship that actually exists. Further, US LEC has asked for details of the implementation of the relationship that the Authority approved and is entitled to this information as well. The Internal Audit provided with EPB’s *Response*

⁴ *Electric Power Board of Chattanooga’s Response to Discovery Request of US LEC of Tennessee, Inc.*, September 20, 2002, p. 2.

⁵ *Motion to Compel of US LEC of Tennessee, Inc.*, September 27, 2002, p. 2.

⁶ *Id.*

⁷ *Response of Electric Power Board of Chattanooga to Motion to Compel of US LEC of Tennessee, Inc.*, October 8, 2002, p. 1.

⁸ *Id.*, pp. 2-3.

does, as EPB contends, go some of the way toward responding to this request, but this Internal Audit consists largely of conclusions. If additional detail as to the relationship between EPB and EPB Telecommunications is available, EPB shall provide this detail as requested by US LEC. US LEC's *Motion* is granted as to this request.

Request No. 17

This request states:

Does EPB provide other CLECs the right to use its poles, rights of way, conduits, building entrance facilities, easements or any other instrumentalities or devices of EPB to run telecommunications lines? If so, please describe such use and the corresponding charges to the CLECs.⁹

In its *Response*, EPB stated:

Yes. Pursuant to Rule 33.03 of the Tennessee Rules of Civil Procedure, EPB will make available for inspection and copying its pole attachment and other facility use agreements with competitive local exchange carriers upon reasonable notice arranged in advance through EPB's counsel.¹⁰

In its *Motion*, US LEC states that this response is incomplete. US LEC contends that it believes that no CLEC other than EPB Telecommunications is using EPB's building access facilities. US LEC asks: "If, in fact, the use of those facilities is available to other CLECs, what are 'the corresponding charges to the CLECs' for the use of those facilities?"¹¹ In its *Response to Motion*, EPB states that US LEC "apparently misreads EPB's response to this Request."¹² EPB states: "US LEC Request No. 17 was broadly drawn to include not only 'building entrance facilities,' but also 'the right to use [EPB's] poles,' and EPB was responding to this latter part of US LEC's Request."¹³

⁹ *Discovery Request of US LEC of Tennessee, Inc. to Electric Power Board of Chattanooga*, August 29, 2002, p. 8.

¹⁰ *Electric Power Board of Chattanooga's Response to Discovery Request of US LEC of Tennessee, Inc.*, September 20, 2002, p. 8.

¹¹ *Motion to Compel of US LEC of Tennessee, Inc.*, September 27, 2002, pp. 2-3.

¹² *Response of Electric Power Board of Chattanooga to Motion to Compel of US LEC of Tennessee, Inc.*, October 8, 2002, p. 2.

¹³ *Id.*

EPB's *Response to Motion* indicates that EPB's response means that EPB does provide other CLECs the right to use its poles but does not provide other CLECs the right to use its building entrance facilities. It is unclear whether EPB provides other CLECs the right to use its rights of way, conduits, easements or "any other instrumentalities or devices of EPB." EPB should clarify its response as to these items and, if the answer is that EPB does provide rights to these items to other CLECs, EPB should "describe such use and the corresponding charges to the CLECs." US LEC's *Motion* is granted as to this request.

Request No. 19

US LEC asks EPB to describe EPB's or EPB Telecommunications' relationship with MetroNet "or any MetroNet related entity."¹⁴ US LEC also requests copies of any contracts "evidencing a business relationship between EPB, EPB Telecommunications and MetroNet and/or related entities."¹⁵ In its *Response*, EPB objected to this request on the ground that it seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In its *Motion*, US LEC states:

Based on news articles (which were attached to US LEC's responses to discovery) MetroNet is part of EPB and intends to offer, among other things, high speed data transmission services to end users in Chattanooga. Such offerings constitute telecommunications services and, by state law, may only be offered by EPB Telecommunications. The purpose of this question is to learn more about MetroNet and its relationship to EPB and EPB Telecommunications.¹⁶

In its *Response to Motion*, EPB states that "MetroNet, Inc. is a separate Tennessee non-profit corporation that intends to provide broadband Internet connectivity."¹⁷ Further, EPB

¹⁴ *Discovery Request of US LEC of Tennessee, Inc. to Electric Power Board of Chattanooga*, August 29, 2002, p. 8.

¹⁵ *Id.*

¹⁶ *Motion to Compel of US LEC of Tennessee, Inc.*, September 27, 2002, p. 3.

¹⁷ *Response of Electric Power Board of Chattanooga to Motion to Compel of US LEC of Tennessee, Inc.*, October 8, 2002, p. 2.

“submits that MetroNet’s anticipated Internet operations have no bearing on the issues that US LEC has raised in its Complaint.”¹⁸

After reviewing EPB’s statements and the newspaper article provided with US LEC’s discovery responses, and based solely on this preliminary review, the Hearing Officer concludes that MetroNet might be classified as an Internet service provider. By the same token, MetroNet might be classified as a provider of high speed Internet connectivity. Without concluding that an Internet service provider can under no circumstances be classified as a provider of telecommunications services, the Hearing Officer finds that US LEC has alleged sufficient facts that could render MetroNet a provider of telecommunications services (and thus a “public utility” subject to the Authority’s jurisdiction). Although US LEC has not alleged that the Authority’s Order prohibits an affiliate or contractual relationship between EPB and an Internet service provider, it would be necessary for the Authority to determine whether Tenn. Code Ann. §7-52-401 requires Authority approval of such a relationship. Accordingly, the Hearing Officer grants US LEC’s *Motion* as to this request.

Request No. 21 This request states:

Has EPB allowed EPB Telecommunications to run telecommunications lines into the buildings of EPB’s existing customers without seeking approval or obtaining an easement or right of way from the building owner? If so, please identify each instance where such has occurred, the identity of the customer and the corresponding charge to EPB Telecommunications.¹⁹

In its *Response*, EPB stated:

No, EPB Telecommunications has obtained building access agreements with the building owners to obtain their approvals for EPB Telecommunications’ access to these buildings.²⁰

¹⁸ *Id.*

¹⁹ *Discovery Request of US LEC of Tennessee, Inc. to Electric Power Board of Chattanooga*, August 29, 2002, p. 9.

²⁰ *Electric Power Board of Chattanooga’s Response to Discovery Request of US LEC of Tennessee, Inc.*, September 20, 2002, p. 9.

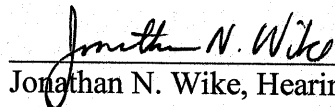
In its *Motion*, US LEC states that this response is incomplete. US LEC states: "In cases where EPB Telecommunications has obtained a building access agreement with a building owner, US LEC has asked what is the 'corresponding charge to EPB Telecommunications' for that access?"²¹

In its *Response to Motion*, EPB states that its "response was complete with the answer 'No.'"²² EPB states that the request "was limited to arrangements between EPB and EPB Telecommunications for access to buildings without the owners' consent and does not ask for arrangements between the owner and EPB Telecommunications."²³

The Hearing Officer finds that EPB has sufficiently responded to this request. US LEC's request calls for a "yes" or "no" answer, and EPB has answered "no." US LEC's *Motion* is denied as to this request.

IT IS THEREFORE ORDERED THAT:

US LEC's *Motion* is granted in part and denied in part, as set forth in this Order.


Jonathan N. Wike, Hearing Officer

²¹ *Motion to Compel of US LEC of Tennessee, Inc.*, September 27, 2002, p. 4.

²² *Response of Electric Power Board of Chattanooga to Motion to Compel of US LEC of Tennessee, Inc.*, October 8, 2002, p. 2.

²³ *Id.*, pp. 2-3.